

including [Mrs. F.'s] participation on the Board of the [school] where her daughter, [S.F.], was in attendance.

3. In June of 1989, the [petitioners] were contending with a new baby, [O.F.], in the home and their first daughter, [S.F.], was also reacting and vying for attention, no longer being an only child.

4. Prior to June, 1989, the [petitioners] had never used spanking as a punishment for [S.F.], who is generally regarded as a somewhat overindulged only child.

5. In June, 1989, the [petitioners] were contending with one particular problem regarding [S.F.], that being her pattern of refusing to go to sleep in her room and testing her parents by regularly leaving her room at night and refusing to stay in bed.

6. Prior to June, 1989, the [petitioners] had attempted many of the techniques that they had previously learned in order to deal with this problem, to wit, reading bedtime stories to [S.F.], massaging [S.F.], laying down with her until she went to sleep, and a system of charts and rewards.

7. None of these techniques seemed to cure the problem for [S.F.] who was now going to turn four and still insistent on falling asleep with her parents at night.

8. The [petitioners], based on their previous education, discussions with other parents, reading, etc., felt that this habit was unhealthy for [S.F.] and needed to

be broken.

9. They discussed among themselves, the various techniques which had previously been unsuccessful and both decided that they would attempt to tell [S.F.] that if she continued to leave her room against their wishes, they would give her a spanking. Although [petitioners] were very much against the use of physical punishment, they felt that in this situation, it was their best alternative, other less intrusive techniques having been unsuccessful.

10. [Petitioners] advised [S.F.] that if she continued to leave her room on a particular night that she would receive a spanking.

11. Following the normal routine of methods employed to attempt to motivate [S.F.] to stay in her room, [Mr. F.], as agreed, spanked [S.F.] on the fleshy part of her bare bottom with his open hand and told her to stay in her room and brought her to her room. [Petitioners] had previously agreed that [Mr. F.], although reluctant, would do the spanking since [Mrs. F.] felt she could not do this herself, although she was completely supportive of this decision.

12. Because [Mr. F.] did not spank [S.F.] with any force on the first number of occasions when she left her room, [S.F.], laughing, felt the matter was a joke and taunted her father with words to the effect that "that didn't hurt at all".

13. At the time of these spankings, [Mr. F.] was not

angered nor did he lose emotional control, but rather, felt that a consistent follow through must be engaged in order to effectively deal with the daughter's testing.

14. Thereafter, when [S.F.] came out again on numerous times, he attempted to increase the force of the spankings in order that they would have some effect. Again, however, the spankings were accomplished by open hand on [S.F.'s] bottom.

15. Eventually, [S.F.] went to bed.

16. [Petitioners], thereafter, discussed the use of the spanking and both felt that it would probably be discontinued in the future since it left them, as caring parents and non-violent people, emotionally drained and since its impact on [S.F.] had not been particularly effective.

17. The next day, [petitioners] noticed the beginnings of a light bruising on [S.F.'s] behind. They described [S.F.] as having very fair skin and bruising easily. The black and blue mark on [S.F.'s] behind was present for a few days.

18. On June 26, 1989, the morning after the spanking, someone at [S.F.'s] preschool observed the mark on [S.F.'s] rear end as [S.F.] was changing into her bathing suit to go swimming, and the matter was reported to SRS for investigation. The case was assigned to [social worker] of the [district office].

19. [Social worker] went to [S.F.'s] home and

interviewed [Mrs. F.]. [Mrs. F.] was extremely upset and had many questions regarding the law and SRS involvement in their family and stated to [social worker] that [S.F.] was not aware that she had any bruise and requested the [social worker] not to focus in or create any unusual or traumatic experience for [S.F.]. [Mrs. F.] advised that she was aware that [S.F.] did have a black and blue area on her bottom.

20. [Social worker] asked [S.F.] what happened if she did not obey the rules in the house and how she got punished, and [S.F.] said she got spanked. [Social worker] than asked [S.F.] if it hurt and she said yes. When asked if she had any "boo boos", [S.F.] said she did not, indicating that [S.F.] was unaware that the spanking had left any mark on her behind.

21. [Social worker] advised [petitioners], according to her training, that a mark on a child from a spanking is against the law, no matter what the circumstances, and [Mr. F.], while questioning the law, indicated that if this was the case, this would not happen again. In so advising [petitioners], [social worker] was following departmental training that, to her understanding, when a mark is left from spanking, a founded case of child abuse must be recorded. [Social worker], however, felt on the basis of her experience and training, that the child exhibited no evidence that the child was, in fact, an abused child or that the [petitioners] used physical discipline on a regular basis. In fact, her opinion was that [S.F.] was a somewhat

spoiled and over-indulged child and was reacting to the presence of a new baby in the household by acting out.

22. [Social worker] recommended that [petitioners] seek consultation with a therapist and although they believed that they had done nothing improper, [petitioners] did, in fact, accept a referral from their [pediatrician] to [counselor] with a doctorate in education.

23. Following professional consultation with the [petitioners] between October, 1989 and July, 1990, [counselor] concluded that the [petitioners] were "continuously caring, bright, educated and motivated parents to work with. . . [&] . . . saw, no evidence of the typical physically abusive parents whom I have worked with, both in terms of your ability to learn and try various parenting techniques. . . ." [Letter of May 15, 1991].

24. The [petitioners], for their own reasons as explained above, have not used spanking as a technique in their child rearing of [S.F.] before or since this incident.

25. On the basis of the above, a finding of abuse was sustained by the worker and by the Department, based upon their interpretation of the provisions of 33 V.S.A. 4911 et seq, that any spanking which leaves any temporary mark on the child is, as a matter of law, child abuse and must be recorded and founded as such.

26. As a result of the finding of abuse by the Department and inclusion of [S.F.] in its registry of abused children, [Mrs. F.], who was previously on the Board of the

[school], [S.F.'s] preschool, received a letter from the [school] stating that she could no longer participate in any school affairs or be present at the school except for the limited purpose of dropping off and picking up of [S.F.] at the [school].

27. The effect on the [petitioners], their school and community participation and their family life from the finding of abuse and their exclusion as a matter of law in participation in preschool activities, has been one of psychological trauma and alienation.

ORDER

The decision of the Department of Social and Rehabilitation Services finding that the child has been abused is reversed and the finding is expunged from the registry.

REASONS

The issue squarely before the Board in this matter is whether the Department of Social and Rehabilitation Services, after investigating a report of parental abuse of a child and determining that the child's health and welfare is not being harmed or threatened with harm, is, nevertheless, required by the statute at 33 V.S.A. § 4912, to substantiate a finding that the child is abused by virtue of the presence of a bruise on the child's buttocks.

The statute in question provides the following definition of "abused child":

As used in this subchapter:

(1) "Child" means an individual under the age of majority.

(2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare or a child who is sexually abused by any person.

(3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:

- (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury; or
- (B) Commits, or allows to be committed, against the child, sexual abuse; or
- (C) Fails to supply the child with adequate food, clothing, shelter or health care. For the purposes of this subchapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law. Notwithstanding that a child might be found to be without proper parental care under chapter 55 of Title 33, a parent or other person responsible for a child's care legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone; or
- (D) Abandons the child.

(4) "Threatened harm" means a substantial risk of physical or mental injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or mental health or protracted loss or impairment of the function of any bodily organ.

(5) "A person responsible for a child's welfare" includes the child's parent; guardian; foster parent; any other adult residing in the home who serves in a parental role; an employee of a public or private residential home, institution or agency; or other person responsible for the child's welfare while in a residential, educational or day care setting, including any staff person.

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

(7) "Mental injury" includes a state of substantially diminished psychological or intellectual functioning of a child as evidenced by an observable and substantial impairment; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the parent or guardian to exercise a minimum degree of care toward the child.

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

(9) "Multi-disciplinary team" means a group of professionals, paraprofessionals and other appropriate individuals, empaneled by the commissioner of social and rehabilitation services under this chapter, for the purpose of assisting in the identification and investigation of cases of child abuse and neglect, coordinating treatment services for abused and neglected children and their families and promoting child abuse prevention.

(10) "Substantiated report" means that the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected.--Added 1981, No. 207 (Adj. Sess.), § 1, eff. April 25, 1982; amended 1985, No. 211 (Adj. Sess.), §§ 1, 2; 1989, No. 295 (Adj. Sess.), §§ 1, 2.

The Department argues that paragraph (6) of the above statute through the use of the word "temporary disfigurement" in the definition of physical injury requires a finding of abuse whenever a bruise is present on a child.

The Department relies on the Board's decision in Fair Hearing No. 10,419 in which it was held in a case also involving a bruise caused by a spanking that "the

Department's position that a child who has been bruised by an adult by other than accidental means is a 'physically abused' child within the meaning of the statute is a reasonable one and is consistent with the language in the statute." The Department has interpreted that statute and the Board's decision to mandate abuse findings whenever a bruise is found on a child.

The petitioners counter that the statutory language cited above broadly defines what could be considered harm at paragraph (3) above but does not require that harm be found when any or all of those situations exist. The petitioners points to the use of the word "can" in paragraph (3) to support their assertion that the existence of a physical disfigurement does not require per se a finding of abuse. Rather, the petitioners argue that a finding of abuse requires the Department to look at all the circumstances and to determine, in its discretion, whether "the child's physical or mental health or welfare is harmed or threatened with harm by the acts of the parents" as required by paragraph (2) above. The petitioners argue that any other interpretation violates the statutory goal of protecting children and their own fundamental rights as parents under the due process clause of the Fourteenth Amendment to the Constitution.

A careful reading of the statutory language shows that the petitioners are correct. The definition of harm in the statute at 33 V.S.A. § 4912(3) provides the Department with

a very broad range of events which could lead to a finding of abuse but does not require that abuse be found if one of those events occurs. The use of the word "can" gives the Department the authority to find harm based on the existence of one of those events but does not require that it do so. The Department is only bound by the definition of "abused or neglected child" found at 33 V.S.A. § 4912(2), (see above) which necessarily requires the use of judgment and a determination based on the whole situation as best it can be known to the social worker.

The finding in Fair Hearing No. 10,419, while resting on the existence of the bruise, also contains many disturbing elements in addition to the bruise itself (angry, uncontrolled hitting; disagreement by the parents over the spanking; the tender age of the child) which made it plain that the social worker believed the child was being harmed by the acts of her parents.

In contrast in this matter, the social worker has determined and testified that she did not believe that the child was harmed or threatened with harm by this or other acts of her parents. As such, the child cannot be found to be "abused or neglected", under the statute. The finding should, therefore, be expunged as lacking in substantiation pursuant to 33 V.S.A. § 4916(h).

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